

E-FILED on 5/29/12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

SUIBIN ZHANG,

Defendant.

No. CR-05-00812 RMW

FINDINGS OF FACT, ANALYSIS AND
VERDICT (UNREDACTED VERSION)¹

This case was tried by the court sitting without a jury with evidence received from October 24, 2012 through November 1, 2012 and with final argument heard on November 11, 2012. Both parties waived a jury. The court now renders its verdict based upon its findings of fact and conclusions of law.

I. CHARGES

Defendant Suibin Zhang ("Zhang") is charged with three counts of computer fraud in violation of 18 U.S.C. §§ 1030(a)(4) and 1030(c)(3)(A) (Counts One through Three); three counts of

¹ Marvell has filed a response to the court's request that it identify any portion of the court's Findings of Fact, Analysis and Verdict that it contends reveals a Marvell trade secret. By a filing dated May 17, 2012 Marvell advised that "Marvell does not request that any portions of the Verdict remain under seal." Accordingly, this unredacted version of the court's Findings of Fact, Analysis and Verdict is filed in the court file available to the public.

1 theft of trade secrets in violation of 18 U.S.C. § 1832(a)(1), (2) and (4) (Counts Four through Six);
2 one count of unauthorized copying of trade secrets in violation of 18 U.S.C. § 1832(a)(1), (2) and (4)
3 (Count Seven), one count of unauthorized transmission of trade secrets in violation of 18 U.S.C. §
4 1832(a)(2) and (4) (Count Eight); and one count of unauthorized possession of stolen trade secrets in
5 violation of 18 U.S.C. § 1832(a)(3) and (4)(Count Nine). All the alleged trade secrets belong to
6 Marvell Semiconductor, Inc. (“Marvell”), a supplier of semiconductor chips to Netgear, Inc.
7 (“Netgear”). The government charges that Zhang, while still employed as a Project Engineer at
8 Netgear but after he had accepted a job offer from Broadcom Corporation (“Broadcom”),
9 misappropriated Marvell trade secrets to which he had access in his position at Netgear.

10 **II. FINDINGS OF FACT**

11 1. Broadcom is a corporation based in San Jose, California that designs and markets
12 semiconductor chips for broadband communication devices.

13 2. Marvell is a corporation based in Sunnyvale, California that designs and markets
14 semiconductor chips for broadband communication devices. Broadcom and Marvell are fierce
15 competitors.

16 3. Netgear is a corporation based in San Jose, California that offers networking products for
17 home offices and small and medium sized businesses. Netgear provides its product designs and
18 specifications on a limited basis to technology suppliers, including Broadcom and Marvell, that
19 supply Netgear with customized products such as switches and transceivers, which Netgear
20 incorporates into its networking devices. Although Netgear’s committed projects as of April of 2005
21 did not include a chassis solution for large networks, Netgear’s small/medium business group was
22 investigating the technical feasibility and cost of offering such a product.

23 4. At all times relevant to this case, Marvell’s products included two switch families named
24 “Link Street” and “Pretera.” The Pretera switches include: DX switches which are designed for
25 home use and small to medium-sized business networks, EX switches designed for enterprise and
26 large business networks and MX switches designed for use in metropolitan area networks by
27 telecommunication companies or other large businesses with networks covering large geographic
28 areas.

1 5. (a) Marvell takes many steps to protect the confidentiality of its proprietary
2 information. Access to Marvell's office campus is restricted. Parking lot and building access require
3 card keys and visitors must register and agree to a non-disclosure agreement when entering a
4 building. Visitors must be escorted at all times when on the campus. Some floors in the buildings
5 have additional card key only access.

6 (b) Marvell maintains a restricted access extranet ("Marvell Extranet"). The Marvell
7 Extranet is a private network that uses the Internet to share certain business information with
8 suppliers, vendors and customers. The Marvell website serves as a document repository which
9 enables authorized businesses to have controlled access to Marvell's proprietary product
10 information. Marvell's website advises that the use the Marvell Extranet requires acceptance of a
11 Non-Disclosure Agreement ("NDA"), because the information provided within the site represents
12 Marvell's proprietary information. The NDA requires Marvell Extranet users to maintain the
13 confidentiality of the information available on the site.

14 (c) To gain access to the Marvell Extranet, Marvell requires applicants to complete a
15 registration form which identifies the user and products of interest. A Product Manager at Marvell
16 then reviews the registration application and decides what Extranet folders (categories of private
17 information) the applicant will be allowed to view based upon the user's specific need. After an
18 NDA is signed by the user, the user is assigned a user identification (his or her e-mail address) and a
19 secure password. The user is then directed to the "Terms of Use" and prompted to click an "Accept"
20 button, a requisite to entry to the site. The Terms of Use incorporate the NDA and a limited use
21 license agreement.

22 (d) Highly sensitive files available on the Marvell Extranet require an additional
23 download password. To get such a password, the user must first e-mail Marvell and request a
24 temporary password. Marvell then e-mails the user a unique password which is only for a particular
25 download. The password expires after sixty minutes.

26 (e) Every downloaded file incorporates a hash code which identifies the user and
27 records the date and time of the download in an alphanumeric code. A confidential watermark is
28 also incorporated in three locations in the downloaded file. Marvell maintains computer records

1 showing user activity on the Extranet including the name of the customer and its authorized
2 employees, the date and time of log-ins and a description of any downloaded material.

3 6. Netgear's website describes Netgear's mission as "to be the preferred customer-driven
4 provider of innovative networking solutions for small businesses and homes." Because Netgear's
5 customer base is home users and small businesses, Netgear purchases products from Marvell's Link
6 Street and DX product lines. Marvell permits certain Netgear employees to access Marvell's
7 Extranet to review and consider such products.

8 7. Defendant Zhang began working at Netgear as a switch design engineer on August 14,
9 2000. He was promoted to Product Development Manager in December of 2001 and was
10 responsible for Ethernet hub and switch development. He had responsibility for managing the
11 development and deployment of small and medium sized business products. On November 6, 2003
12 he signed Marvell's Limited Use License Agreement on behalf of Netgear, which provides in part:
13 "Marvell hereby grants to Licensee . . . a non-exclusive non-transferable, non-exclusive, royalty-free
14 limited license to use and, if required, modify [the software modules comprising the Marvell
15 Pretera Software Suite, and any Marvell specified documentation thereon, provided by Marvell to
16 Licensees] for (i) Licensee's internal evaluation in connection with development of Licensee's
17 Products and/or Licensee's Software for use exclusively with Marvell's Products" Ex. 33 at §
18 2.1. Zhang, on behalf of Netgear, further agreed that "Licensee shall maintain in confidence
19 Marvell's confidential Information in accordance with the terms of that Non-Disclosure Agreement
20 ('NDA') most recently entered into by Licensee and Marvell or any Marvell Affiliate." *Id.* at § 4.
21 Zhang acknowledged that the NDA had been renewed on August 21, 2003. The NDA provides,
22 among other things, that "Receiver agrees not to use any Confidential Information for any purpose
23 except to evaluate and engage in discussions concerning a potential business relationship between
24 Company and Marvell" (Exs. 22 at ¶ 3; 34 at ¶ 3); "Receiver agrees that it shall take all reasonable
25 measures to protect the secrecy of and avoid disclosure and unauthorized use of Confidential
26 information" (*id.* at ¶ 4); "All documents . . . containing or representing Confidential Information
27 and all copies thereof in the possession of Receiver . . . shall be promptly returned to Discloser upon
28 Discloser's request or upon the termination of this Agreement. *Id.* at ¶ 7. Confidential information

1 is broadly defined by the NDA and required to be marked as “‘Confidential,’ ‘Proprietary’ or the
2 substantial equivalent thereof.” *Id.* at 2. Zhang had default access to the Marvell Extranet as
3 Netgear’s Product Manager. He was given a user name and password. Zhang knew that Netgear
4 was governed by Marvell’s Extranet Terms of Use and that he had to comply with those terms. *See*
5 Ex. 21. Zhang was personally governed by Netgear’s Employee Invention Assignment and
6 Proprietary Information Agreement. Ex. 38. Although a copy of that agreement signed by Zhang
7 apparently could not be found by Netgear, the evidence was highly persuasive that he had, in fact,
8 signed it. Exhibit 39 lists Zhang as a signatory and Wylea Kirkpatrick, who worked in the personnel
9 office at the time, confirmed she had seen a copy of the agreement that Zhang signed. Her job duties
10 included making sure that the appropriate employees signed the Agreement.

11 8. In the Fall of 2004 and Spring of 2005, Zhang applied for employment with both Marvell
12 and Broadcom. He interviewed at Marvell on February 14, 2005 and signed a unilateral non-
13 disclosure agreement with Marvell which was similar to one he previously signed with Netgear. Ex.
14 32. On March 3, 2005 he received an employment offer from Marvell. He also received an offer
15 from Broadcom, but it was not clear from the evidence when the offer was made or when he
16 accepted it. On March 8, 2005 Zhang e-mailed his supervisor at Netgear and indicated that he had
17 accepted a job at Broadcom in the area of strategic product planning and intended to leave Netgear
18 by the end of March 2005. On March 10, 2005 Zhang also advised those with whom he had
19 interviewed at Marvell that he was not taking Marvell’s offer of employment. He told Marvell that
20 “I will remain at Netgear for a few weeks for the transition and continue to drive existing committed
21 projects for delivery. To avoid any conflict of interests, I would excuse myself from involving
22 chipset decisions for new projects.” Ex. 31. Zhang agreed to extend his last day at Netgear to April
23 15, 2005 because Netgear was having difficulty finding someone with the qualifications necessary
24 for the position Zhang had. The evidence is unclear as to what work Zhang actually did for Netgear
25 after he indicated he had accepted a position with Broadcom.

26 9. (a) On March 9, 2005 Zhang downloaded the following information from the Marvell
27 Extranet using the authorization he had for access:

28 DATASHEET- 88E6185, 88E6182, 88E6155, 88E6152, Gigabit Ethernet Switch

1	RD-88E6095-48F4G Reference Design Schematics
2	48FE +2GE Managed and Stacked System Hardware System Design Specification
3	RD-88E6095-48F4G Design and Layout Guidelines
4	RD-88E6095-48F4G Reference Design BOM
5	RD-88E6095-48F4G Gerber Files
6	SOHO Switch Software Architecture Specification
7	SOFTWARE - SOHO Switch Drivers DSDT Ver 2.3b
8	WHITE PAPER - Auto-Neg/MAC Interface
9	WHITE PAPER - Auto-Neg/MAC Interface
10	WHITE PAPER - Back-Pressure for Flow Control
11	WHITE PAPER - Common Mistakes with Ethernet System
12	WHITE PAPER - Flow Control Explained
13	WHITE PAPER - How to Quote, Measure and Use Power
14	WHITE PAPER - Supply Noise Measurement
15	WHITE PAPER - Tutorial on Clock PPM Effects
16	WHITE PAPER - Tjc, Tja & Temperature Calculations
17	Bailout for Prestera 98DX270 and 98DX273
18	Hardware Design Guide for Prestera 98DX250/253/260/263/270/273
19	Hardware Specification for Prestera 98DX250/253/260/263/270/273
20	Product Brief - 98DX253/263/273
21	Functional Errata and Restriction for DX166/166R/246/250/260/270
22	FUNCTIONAL SPECIFICATION & REGISTER SET FOR
23	98DX166/166R/167/167R/246/247/250/253/260/263/270/273/803
24	BSDL Model for 98DX273 Rev A1
25	IBIS Model for 98DX250/253/260/262/263/270/273/803 Rev A1
26	Bailout for Prestera 98DX803
27	Hardware Specification for Prestera 98DX803
28	Product Brief- Prestera 98DX803

1 FUNCTIONAL SPECIFICATION & REGISTER SET FOR
2 98DX166/166R/167/167R/246/247/250/253/260/263/270/273/803

3 BSDL Model for 98DX803 Rev A1

4 IBIS Model for 98DX250/253/260/262/263/270/273/803 Rev A1

5 Bailout for 98EX126-A

6 Hardware Specification - Prestera 98EX116, 98EX126 and 98EX136 Packet
7 Processors

8 FUNCTIONAL ERRATA- PRESTERA PACKET PROCESSOR
9 98EX116-N98EX126-A

10 (b) On March 16, 2005 Zhang downloaded the following information from the
11 Marvell Extranet:

12 Ballout for 98EX126-A

13 APPLICATION NOTE - AN-171 Policy and Meter Configuration Guidelines

14 APPLICATION NOTE - AN-146-FC and HOL Configuration for Prestera Devices

15 APPLICATION NOTE - AN-148 Implementing a GbE Desktop Value-Added
16 Solution using the Prestera 98DX240 and 98EX126 Devices

17 APPLICATION NOTE- Prestera Hardware Design Guide for EX/FX/MX

18 APPLICATION NOTE - AN-126 Thermal Management and Power consumption
19 for the Prestera Packet Processor

20 APPLICATION NOTE- an-118 ppm Differences Between Rx Clock and Tx Clock

21 APPLICATION NOTE - AN-I 02 Prestera Systems Power Sequencing

22 APPLICATION NOTE - AN-109 1Pv4 Routing Engine Data Structure Memory
23 Consumption in the Prestera-EX Packet Processor Family

24 APPLICATION NOTE- AN-122 Broadcast and Multicast Rate Limit Configuration

25 APPLICATION NOTE- AN-151 Implementing Auto-Media Detect in 88E IIII/4x
26 Transceivers with Prestera EX/MX Packet Processors

27 APPLICATION NOTE- AN-67 Powering Up/Powering Down Marvell. Devices with
28 Multiple Power Supplies of Different Voltages

APPLICATION NOTE - AN-79 Implementing Nested VLANs Using the Prestera

1 Devices, 98EX and 98MX Family

2 APPLICATION NOTE - AN-80 Pretera Packet Processor Memory Usage

3 APPLICATION NOTE - AN-89 Back-end Port Configuration in Pretera Packet
4 Processors

5 Application Note - Value Blade Software Architecture

6 DB-98EX126-12G750 BOM

7 DB-98EX126-12G750 Schematics DB-98EX126- 12G750 User Manual

8 EV-64260A-750CX-PCI User Guide

9 WxWorks BSP User Manual for EV-64260A-750CX-PCI

10 (c) On March 18, 2005 Zhang downloaded the following documents from the
11 Marvell Intranet:

12 DATASHEET- 88E149 Quad-Channel Gigabit Ethernet PHY

13 APPLICATION NOTE - 88E149 PCB Layout Guidelines

14 APPLICATION NOTE - Alaska MDI Interface Design

15 APPLICATION NOTE - Measuring Supply Noise

16 APPLICATION NOTE - Oscillator References for Gigabit PHYs

17 APPLICATION NOTE- Using Marvell PHYs in Backplane Applications

18 APPLICATION NOTE - Crystal Oscillators

19 APPLICATION NOTES - Differential Single Impedance Calculations

20 SPREADSHEET

21 APPLICATION NOTES - Alaska Gigabit Magnetics

22 APPLICATION NOTES - Alaska Gigabit Magnetics

23 MODELS - 88E149-BAM(BGA) BSDL Model

24 MODELS - 88E149-TAH (TQFP) BSDL Model

25 WHITE PAPER - How to Quote, Measure and Use Power Numbers

26 WHITE PAPER - BER Vs. Packet Loss

27 WHITE PAPER - Auto-Neg/MAC Interface

28 WHITE PAPER - Auto-Crossover & Parallel Detect

DATASHEET - 98MX6x5-A

APPLICATION NOTE - AN-143 Controlling Traffic to the CPU for 98EXlxx - C/D
and 98MXxx Prestera Packet Processor

10. (a) The volume of these three downloads contrasts markedly with the total of nine documents Zhang had downloaded from the Extranet during the fourteen month period before March 2005. There is no evidence that he needed any of the materials from the three March downloads to “drive existing committed projects for delivery.”

(b) The downloaded documents dealt with a broad range of Marvell products and contained what Marvell considered confidential, proprietary information. Exhibit 18 graphically shows Zhang’s downloading activity during the course of Zhang’s employment and how it ran below that of all other Netgear employees combined until March of 2005 when his downloads were many times greater than those of all other Netgear employees’ combined.

(c) The only document downloaded by Zhang from the Marvell Extranet that he shared with Broadcom or any other party is Exhibit # 28 (same as page 96 of Exhibit 5) (a page of the hardware specifications for 98 DX250/253/260/263/270/273). That page is watermarked “Marvell Confidential Under NDA#121011740” and has a footer stating “CONFIDENTIAL.” Although most of the information on the document was known in the industry, it reveals electrical current consumption under extreme conditions which would be valuable to a system designer. *See § 11 below.*

11. The Government proved through the tedious, and at times highly technical, testimony of George Hervey, the senior engineer with Marvell in charge of all customer support for Marvell products, that some of the information Zhang downloaded had independent value from not being generally known to, and not being readily ascertainable by, the public.² Specifically, Hervey discussed Government’s Exhibits 1 through 16 which the Government sought to prove contain trade

² Although defendant contended that the Government failed to prove that the downloaded information derived independent economic value from not being generally known to the public, he offered limited evidence to contest Hervey’s testimony that the information was valuable. He focused more on challenging the Government’s claim that Marvell took reasonable measures to keep such information secret.

secret information. Although Hervey testified that much information contained in those exhibits was available to the public, the combination of the information in each exhibit showed Marvell's product design choices and how the features of its products were implemented. This information is carefully guarded by Marvell and would be of value to a competitor who could use the information in making its own design choices or it could use the information to design tests that would exploit weaknesses in competing Marvell products and cause them to perform poorly under particular circumstances. Hervey also explained that certain pieces of information within the exhibits by themselves have independent value from not being generally known to, or readily ascertainable by, the public. The following table lists: (1) the sixteen exhibits that the Government introduced, (2) the nature of the asserted economic value from not being publically known of both the compendium of information in the exhibit and of certain information on individual pages from the exhibit, (3) what warning the exhibit bears indicating it is confidential and (4) the date of Zhang's download.

Where the Government failed to sustain its burden of showing, for each piece of information, the economic value of not being generally known to the public, the court explains its reasoning in parentheses below the description of the information. Where the Government sustained its burden, the court either simply describes the information or explains why the burden was met without using parentheses.

Alleged Trade Secret	Description of Information and Alleged Economic Value from Not Being Generally Known to the Public	Indications on Document That It Is to Be Kept Secret	Date When Zhang Downloaded Document
Government Exhibit 1: Link Street™ 88E6152/88E6155/ 88E6182/88E6185 Datasheet Specific pages that contain purported trade secret information: a. pg. 6: 88E6152/88E6155/88E6182/88E6185 Device Differences;	<u>Compendium of information</u> For Marvell's Link Street chip family, compendium of information shows the functional description of the device, the interfaces on the device, the electrical power needed to power the device and specific design choices made by Marvell. Some of the design choices continue to be used in Marvell's new generation of products. Public disclosure of information would, among other things, allow competitors to take advantage in the marketplace of how the multiple features of Marvell's product share the	Watermark and footer state "confidential"	3/9/2005

1	b. pg. 69: Format of the Address Translation Unit Database;	same implementation. Has independent value from not being generally known because it has a design and implementation that competitors do not have.		
2				
3	c. pg. 95: Describes the distributed switching architecture;	<u>Specific pages containing purported trade secret information</u>		
4				
5	d. pg. 176: Shows a register and describes a method of gathering statistics from the device.	a. Shows differences between the four devices within the Link Street family. What features are enabled for each device is based on Marvell's knowledge of the industry and understanding of the market. (Hervey's testimony did not establish beyond a reasonable doubt that Marvell's knowledge of the industry and market was not known by the public and thus had independent economic value from not being known by the public).		
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13		b. Shows exact format of forwarding databases, revealing some features that are not traditionally present in a forwarding table such as priority indication, and Marvell's unique design choices such as field multiplexing for reducing memory footprint.		
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17		c. Describes Marvell's implementation of the distributed switching architecture (DSA), which enables two or more devices to behave as a single device. Although the idea of making two devices behave as one by setting particular TAG field is generally known in the industry, the specific bit contents and meaning of Marvell's 4-byte TAG allows it to achieve certain features traditionally difficult to do across chips.		
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23		d. Describes a register associated with the function of gathering statistics from the device, and the different status of the register bits, which are used to control different operations the device performs. The description shows that Marvell's device enables a CPU to collect statistical data from all ports at once, besides collecting them from individual port.		
24		(Hervey testified that this specific		
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1		register design allows Marvell to use low-end CPUs to perform the statistics-gathering function, thereby reducing the cost of the system. However, page 176 makes no reference to low-end CPUs, nor does it teach how to implement the function with low-end CPUs. Without more, the evidence does not establish beyond a reasonable doubt that a competitor would necessarily conclude that the purpose of this register design is to allow the use of low-end CPUs. Accordingly, it is not clear that information on this page alone derives independent economic value from not being publically available.)		
10	Government Exhibit 2: SOHO Switch Software Architecture Specification	<u>Compendium of information</u> Contains software architecture specifications for certain Marvell small office/home office Ethernet switches, which allow customers to develop software on top of Marvell's device drivers. <u>Specific pages containing purported trade secret information</u> a. pg. 80, section 6.2.1.11: definition of Marvell's API (application program interface), which defines how to set the multi cast rate limits; b. pg. 140, section 6.2.5: API for setting a field for the port association vector.	Watermark and footer state "confidential"	3/9/2005
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1		information was a trade secret.)		
2	Government Exhibit 3: DSDT Release version 2.3a	This is the release note accompanying the actual driver software that Marvell provided to customers. The release note is part of a compressed .zip file and not separately downloadable from the Marvell ExtraNet. It describes the changes from the previous version of software as well as a list of contents in the current version. This document enables a competitor to know certain new features that were added to Marvell's devices.	No confidential marking on the document itself. However, not separately downloadable from compressed .zip file.	3/9/2005
9	Government Exhibit 4: 4:98DX250/260/270, 98DX253/263/273, and 98DX262 Prester TM Hardware Design Guide Specific pages that contain purported trade secret information: a. pp.12-13, section 2.3: Capacitors; b. pg. 32, section 3.2.5.5: Lane Swapping of HyperG Stack Ports.	<u>Compendium of information</u> Contains a collection of recommendations for customers who design boards using Marvell's Prester devices. It shows certain design choices that Marvell made such as what type of Gigabit Port there is on the device. Public knowledge would help competitors to estimate the cost of using Marvell's device on a board. <u>Specific pages containing purported trade secret information</u> a. Shows Marvell's suggestions as to the size and characteristics of capacitors to be used for each power rail. This information is derived based on Marvell's design experience, and is applicable to Marvell's devices with certain type of package and interfaces. With this information, a competitor could derive the cost of capacitors for using Marvell's device on a board, and aim to design a device requiring fewer capacitors. (Hervey's testimony is weak regarding the independent economic value of the information, because even if a competitor may derive the cost of capacitors for using Marvell's device on a board, that cost may be trivial in board design because a board contains many different devices that are more expensive than capacitors. Therefore, the evidence introduced does not establish beyond a reasonable doubt that (a) has independent economic	Watermark and footer state "confidential"	3/9/2005

1		value from not being generally known by the public.)		
2		b. Describes an operation on Marvell's inter-chip ports that allows a customer to reduce the layers on the motherboard by swapping pins (positive pin becomes the negative interface).		
3		(The evidence that this information derives independent value from not being generally known is not sufficiently clear to allow a finding of such value beyond a reasonable doubt.)		
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8	Government Exhibit 5: 98DX250, 98DX253, 98DX260, 98DX263, 98DX270, and 98DX273 Prestera-DX	<u>Compendium of information</u>	Watermark and footer state "confidential"	3/9/2005
9		Contains hardware specification for the Prestera product and provides the pinout, thermal characteristics and the electrical description of the device, such as power characteristics, voltage levels, and signaling technology that is used.		
10	Specific pages that contain purported trade secret information:	The document discloses detailed power numbers on each voltage rail covering the worst-case capabilities of the device, instead of a typical power consumption number often disclosed publically for marketing purpose. The detailed power numbers enable customers to determine the cost of a system built around this device, while they cannot achieve that result using just the typical power number.		
11	a. pp. 27-29, Table 4: Pin Functions and Assignment Table key, Table 5: Tri-Speed Network Ports Pin Descriptions, and Table 6: Hyper.GStack PortsXAUI Interface;	Based on the information disclosed in this document, such as the pin map, the interface technologies Marvell chose, the detailed power numbers and the worst-case capabilities of the device, a competitor could make their own design choices to yield a device with more optimized design than Marvell's.		
12		<u>Specific pages containing purported trade secret information</u>		
13	b. pp. 68-70, Fig. 17: Pin Map Top View Left Side of the ball map for the device, Fig. 18: Pin Map Top View Right Side of the ball map for the device, and Fig. 19, Table 20: Pinout Table;			
14		a. Describes each interface and the pins associated with the interface, shows Marvell's choice of the SGMII as the signaling method for the Tri-Speed Network Ports and its choice of XAUI interface for the 10 Gigabit ports, with this device being one of the first devices choosing XAUI as the 10		
15	c. pg. 95, section 7.5: Current Consumption;			
16	d. Government Exhibit 28: Email from Zhang to Kelly Coffey et al. on 6/2/05 and attachment showing a portion of			
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1	Table 7.5.2 on Page 96 of Government	Gigabit interface.		
2	Exhibit 5. This Table	b. Shows Marvell's pin map of the		
3	specifies the AC/DC	device and its pin placement that aimed		
4	analog current	at reducing cross-talk between signals.		
5	consumption per	An attempt to associate pins with a		
6	active 1.25 Gbps	given interface in an attempt to reverse		
7	SERDES lane.	engineer would be extremely difficult.		
8		(It is not clear beyond a reasonable		
9		doubt that this specific information		
10		alone would have independent		
11		economic value from not being		
12		generally known.)		
13		c. Description of the current consumed		
14		by three different devices under worst-		
15		case operating voltages and the current		
16		consumed would be unique to		
17		Marvell's particular device and not		
18		known by the public.		
19		d. Describes current consumption per		
20		active SERDES under extreme test		
21		conditions, with which one could		
22		calculate maximum power consumption		
23		per active SERDES. Such current		
24		consumption data is difficult to obtain		
25		without knowing which power pin to		
26		use, what the extreme test condition is,		
27		and how to power up and down each		
28		SERDES, which is done through		
		software. The power consumption		
		values would allow competitors to		
		understand what they need to target in		
		order to effectively compete against		
		Marvell.		
20	Government Exhibit 6:	<u>Compendium of information</u>	Watermark	3/9/2005
21	Functional Errata and	Describes the problems or change in	and footer	
22	Restrictions 98DX166,	operation of the actual silicon from	state	
23	98DX166R,98DX246,	what is in the specification.	"confidential"	
24	98DX250, 98DX260	Knowledge by a competitor would		
25	and 98DX270	allow it to design test cases that could		
26	98DX270R	cause Marvell's chip to behave poorly		
27	Specific pages that	or fail, or use the information to market		
28	contain purported	against Marvell with a feature that		
	trade secret	Marvell cannot include. It would take		
	information:	competitors significant amount of time		
	a. pg. 15, FEr #24:	and research to find the errata on their		
	Aging Time of Storm	own.		
	Prevention Entries	<u>Specific pages containing purported</u>		
	Aging is Not	<u>trade secret information</u>		
	Accurate;			

1	b. pg. 19, FEr #30: HyperG.Stack Port May Not be Able to Operate at Speed of 12Gbps.	a. Describes a functional erratum with the storm prevention feature in Marvell's device, which is generally used to reduce the overhead time for a CPU to process new addresses. The erratum is that when the storm prevention feature is turned on, address aging is not accurate. With this information, a competitor could build a test case to show that Marvell's storm prevention feature is not usable.		
2		b. Describes a functional erratum with the 10-Gigabit port: for certain packet sizes, the ports are not able to run at 12 Gigabits/s though Marvell has so specified.		
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10	Government Exhibit 7: Functional Specification and Register Set for Pretera 98DX166, 98DX166R, 98DX246, 98DX250, 98DX260, 98DX270, 98DX803, 98DX167, 98DX167R, 98DX247, 98DX253, 98DX263, 98DX273	<u>Compendium of information</u> Describes, on a step-by-step basis, all the functions that are available for every packet or data that flows through the physical device, as well as configurable options associated with a certain function. It allows users to understand the theory of operation of the device, stage-by-stage. <u>Specific pages containing purported trade secret information</u>	Watermark and footer state "confidential." Has second level of password protection.	3/9/2005
11	Specific pages that contain purported trade secret information:	a. Describes Marvell's new feature: Secure Control Technology that is used to protect the CPU from a type of excessive network requests called Denial of Service Attacks. It also shows the different mechanisms with which this feature may work, and different control options Marvell provided to customers who use this feature. Public knowledge would enable a competitor to understand what Marvell was offering to the customers in order to battle Denial of Service Attacks, which became a major threat to networks in the 2003-2004 time frames.		
12	a. pg. 25: Secure Control Technology (SCT) Features;			
13	b. pg. 252, section 12.2: Unicast Routing Overview;	b. Describes a new routing feature being introduced to this class of products. Section 12.2 and what follows give an overview of how Marvell implements this feature, which did not exist in prior-generation		
14	c. pg. 607: Policers and Unicast Routing Engine Configuration Registers.			
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1		solution, with only minimal changes to the predecessor chips. With this		
2		information, a competitor could copy		
3		Marvell's approach to provide the		
4		routing function to their own products.		
5		c. The table summarizes a list of		
6		registers and tables used to configure a		
7		rate-limiting mechanism within the		
8		device called Policar. Public		
9		knowledge would enable a competitor		
10		to understand the different controls		
11		associated with Policar and the limits of		
12		Policar's capability.		
13	Government Exhibit 8:	<u>Compendium of information</u>	Watermark	3/9/2005
14	Functional Errata		and footer	
15	Register	Functional errata for the Prestera	state	
16	Misconfigurations and	EX. Like Government Exhibit 6, this	"confidential"	
17	Restrictions 98EX116,	document describes the problems or		
18	98EX128 and	change in operation of the actual		
19	98EX136	silicon from what is in the		
20	Specific pages that	specification. Knowledge by a		
21	contain purported	competitor would allow it to design test		
22	trade secret	cases that could cause Marvell's chip to		
23	information:	behave poorly or fail, or use the		
24		information to market against Marvell		
25	a. pg. 7, FEr #6	with a feature that Marvell cannot		
26	802.1p:	include. It would take competitors		
27	Marking/Remarking	significant amount of time and research		
28	Ignored on Bridged	to find the errata on their own.		
29	IPv4 Multicast Packets	<u>Specific pages containing purported</u>		
30	that are routed;	<u>trade secret information</u>		
31				
32	b. pg. 15 FEr #23:	a. Describes a functional erratum with		
33	Trunk Load Balancing	a feature that may improperly treat		
34	Limitation of	certain data packets that come in and		
35	Multicast and	incorrectly mark them. Competitor		
36	Unknown Unicast	could use this information to design a		
37	Packets.	system or test lab to expose flaws that		
38		suggest Marvell not meeting industry		
39		standard.		
40		b. An errata describing the limitations		
41		of trunking distribution. Public		
42		knowledge could enable competitors to		
43		build a system to show poor		
44		performances of Marvell's products.		
45	Government Exhibit 9:	<u>Compendium of information</u>	Watermark	3/16/2005
46	Application Note		and footer	
47	Implementing a	Describes a system implementation	state	
48	Solution Using Two	that uses one Prestera EX device and	"confidential"	
49	Prestera Devices	one Prestera DX device, in the same		

1	Specific pages that	system, thereby achieving cost		
2	contain trade secret	efficiency.		
3	information:	<u>Specific pages containing purported</u>		
4	a. pg. 7: Desktop Line	<u>trade secret information</u>		
5	Card Features;	a. Shows positives and negatives from		
6	b. pg. 8, section 5.2:	using this lost-cost two-device		
7	Ethernet Packet	architecture. Specifically, section 5		
8	Marvell Tag Extension	describes the list of features that the		
9	for Cascading Prestera	architecture supports, and section 5.1		
10	Packet Processors;	describes which features of the Prestera		
11	c. pg. 10, section 6.1:	EX device are lost due to the use of this		
12	Line Card Packet	architecture. Public disclosure would		
13	Flow.	allow a competitor to use the concept to		
14		achieve similar results or accentuate the		
15		negatives in competition.		
16		b. Describes how the proprietary TAG		
17		relates information between the two		
18		Prestera devices such that the EX		
19		device can take full advantage of the		
20		DX device capability. Public		
21		knowledge would assist a competitor to		
22		design a similar type of system using		
23		their own TAG.		
24		c. Illustrates step-by-step how data		
25		packets flow through the system and		
26		how data from the DX device is		
27		mapped into the EX feature set. The		
28		latter is an important Marvell solution		
		that allowed it to reduce the cost of the		
		system by fifty percent. Public		
		knowledge would enable a competitor		
		to employ similar approach to achieve		
		fifty-percent cost reduction.		
20	Government Exhibit	<u>Compendium of information</u>	Watermark	3/16/2005
21	10: Prestera®-	Shows customers how to design a	and footer	
22	EX/MX/FX Hardware	board using Marvell's devices. It also	state	
23	Design Guide	shows certain Marvell design solutions	"confidential"	
24	Specific pages that	such as the recommended layout of		
25	contain purported	power balls and ground pins on a		
26	trade secret	board.		
27	information:	<u>Specific pages containing purported</u>		
28	a. pg. 23-24: Stackup	<u>trade secret information</u>		
	Guidelines;	a. Describes the guidelines for how to		
	b. pg. 27, Fig. 13:	limit the number of layers that the		
	PCB Cut Dimensions;	board requires when using Marvell's		
	c. pg. 28: Network	device. With this information,		
		competitors who use similar interfaces		

1	Capacitor and Via	in their own chips could provide similar		
2	Position –PS and CS	guidelines to their customers.		
3	View;	(These stack-up guidelines are very		
4	d. pg. 35, section 3.9:	specific to Marvell's products. It is		
5	Frequent Layout	hard to imagine that these guidelines		
6	Errors;	would have value to a competitor		
7	e. pg. 85: Uplink	absent the remote possibility that its		
8	Interface;	chips are substantially identical to		
9		Marvell's. No showing of the existence		
10	f. pg. 92: Buffer	of such similarity has been made.)		
11	SDRAM Interface.	b. Describes Marvell's		
12		recommendation to customers to use		
13		dual via connection in their board		
14		design. Dual via connection is known		
15		technique in the industry. With this		
16		information, a competitor who uses		
17		similar types of interfaces with		
18		Marvell's product would be able to		
19		make similar recommendation to their		
20		customers.		
21		(Since dual via connection is known		
22		technique, it is not clear that a		
23		competitor using similar interfaces		
24		would need to look at this page to make		
25		similar recommendations to their		
26		customers. Therefore, no showing of		
27		trade secret status.)		
28		c. A picture of part of the actual board		
		design, showing the placement of the		
		power balls and how Marvell		
		implements the dual via connection.		
		The placement of the power balls and		
		the ground pins is Marvell's solution to		
		achieve a solid ground delivery as well		
		as efficient power delivery. Public		
		knowledge would enable a competitor		
		to copy this solution without spending		
		efforts to find it out on their own.		
		d. Describes frequent errors that		
		customers have made when using this		
		chip. Describes why in some cases the		
		industry standard might not be the best		
		practice here.		
		(Although one can speculate that		
		this information would be useful, the		
		evidence introduced does not establish		
		that this information derives		
		independent economic value from not		
		being generally known.)		
		e. Describes the uplink interface, a		
		unique Marvell interface it shared with		

1		its partners who build compatible devices. Public knowledge would enable competitors to understand the concept and speed at which the interface runs; however, it does not necessarily enable them to use the information to an advantage. (Although this information may have independent economic value from not being generally known, the proof offered does not establish that beyond a reasonable doubt.)		
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8		f. Describes Marvell's use of an industry standard interface for connecting to a graphic memory. It shows Marvell's design choice, particularly regarding the use of SDRAM rather than other types of DRAM.		
9		(Evidence is not convincing that information constitutes a trade secret as SDRAM is widely used in semiconductor chips.)		
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14	Government Exhibit 11: Application Note AN-109 IPv4 Routing Engine Data Structure Memory Consumption in the Prestera™-EX Packet Processor Family	<u>Compendium of information</u> Describes IPv4 Routing Engine data structure memory consumption in the Prestera-EX Packet Processor family. Compendium of information reveals in detail Marvell's unique hash algorithm for performing the routing look-up functions as well as the performance of that algorithm under different network test cases. If competitors knew this information, they could use it in designing their own devices or to design a test case that would cause Marvell's algorithm to behave poorly. Most sensitive information of all the sixteen exhibits.	Watermark and footer state "confidential"	3/16/2005
15	Specific pages that contain purported trade secret information:			
16	a. pg. 2: Fixed Size Initial Table;			
17	b. pg. 3-4: Memory consumption tools & Examples.	<u>Specific pages containing purported trade secret information</u>		
18		a. Describes the concept of the hash algorithm. Has independent economic value because knowledge of the algorithm would enable competitors to use the algorithm to obtain the results and advantages Marvell has obtained from the algorithm.		
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28		b. Describes a way to evaluate the		

1		performance and efficiency of the hash algorithm. <i>See</i> (a) <i>above</i> on value.		
2				
3	Government Exhibit 12: Application Note Prestera™ Packet Processor Memory Usage	<u>Compendium of information</u> Describes which control tables exist in which memory and the potential trade-offs that a system designer would have to make given a certain memory.	Footer states “confidential”	3/16/2005
4				
5	Specific pages that contain trade secret information:	<u>Specific pages containing purported trade secret information</u>		
6				
7	a. pg. 2-3: Internal Memory Configuration & Tables Memory Consumption;	a. Describes the different components that make up the internal memory of Marvell’s device. (Although this information may have independent economic value from not being generally known, testimony presented did not establish that beyond a reasonable doubt.)		
8				
9	b. pg. 5: Flow Table;			
10				
11	c. pg. 6-7: Flow Lookup Structure.	b. Describes the capabilities of the Marvell’s flow table algorithm and its memory consumptions, without disclosing details of the algorithm. With this information, a competitor may design a test case to cause Marvell’s algorithm to fail.		
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16		c. Describes memory requirements and usage for different flow lookup structures. (As with (a) <i>above</i> , this information probably derives economic value from not being generally known but testimony presented did not establish that beyond a reasonable doubt.)		
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21	Government Exhibit 13: Application Note Software System Architecture for the 98 EX126-98DX240 Value Blade	<u>Compendium of information</u> Goes through how the software treats the value blade (a line card) that provides enhanced services at lower cost. (The testimony offered did not establish independent economic value from not being generally known.)	Footer states “confidential”	3/16/2005
22				
23	Specific pages that contain purported trade secret information:	<u>Specific pages containing purported trade secret information</u>		
24				
25	a. pg. 2: Value Blade Architecture & System Benefits;	a. A connection diagram showing how devices are connected in the value blade architecture, and the benefits of		
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1	b. pg. 3, section 2.3: System Limitations;	the architecture.		
2		b. Describes the features of a Marvell's		
3	c. pg. 9, section 4.1: PSS Architectural Modifications	device that are lost due to the use of this architecture, in other words, the downside of using the architecture. Like Government Ex. 9, item a, public disclosure of this information could allow a competitor to accentuate the negatives in competition.		
4				
5		c. Describes the architectural		
6		modifications Marvell made to the PSS		
7		(software driver for the Prestera		
8		Software Suite).		
9		(Testimony does not show beyond a		
10		reasonable doubt derivation of		
11	Government Exhibit 14: 88E1149	<u>Compendium of information</u>	Watermark	3/18/2005
12	Datasheet Integrated	Datasheet for Marvell's quad-port	and footer	
13	10/100/1000 Gigabit	Gigabit PHY. As PHY is an industry-	state	
14	Ethernet Transceiver	standard interface, a large portion of	"confidential"	
15	Specific pages that	this data sheet is specified according to		
16	contain purported	industry standard.		
17	trade secret	(Although Exhibit 14 does show		
18	information:	how Marvell implements a solution to		
19		meet those standards and that		
20	a. pp. 41-42, 48:	implementation may be a trade secret,		
21	Description of a power	the evidence presented is insufficient to		
22	management scheme	show beyond a reasonable doubt the		
23	using a feature called	information derives independent value		
24	virtual cable testing.	from not being generally known.)		
25		<u>Specific pages containing purported</u>		
26		<u>trade secret information</u>		
27		a. Describes a low-power scheme of		
28		powering down output driver based on		
		system characteristics. This is the		
		mechanism Marvell uses to allow the		
		device to meet industry standard while		
		consuming less power. Public		
		knowledge may allow a competitor to		
		learn the mechanism and use it in their		
		own products.		
25	Government Exhibit 15: 98MX615,	<u>Compendium of information</u>	Watermark	3/18/2005
26	98MX625, 98MX635	Datasheet for the Prestera MX	and footer	
27	Prestera® Packet	device family. Like Government Ex. 1,	state	
28	Processor Datasheet	here compendium of information shows	"confidential"	
	Specific pages that	the functional description of the device,		
		the interfaces on the device, the		

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contain trade secret information: a. pg. 108: Reads and Writes; b. pg. 110: Address Completion.	electrical power needed to power the device and specific design choices made by Marvell. Public disclosure of information as a whole would enable competitors to gain unfair advantage over products manufactured by Marvell as it allows competitors to understand the theory of the device's operation that is unique to Marvell, as well as Marvell's solutions in tackling certain challenges in this type of system design. <u>Specific pages containing purported trade secret information</u> a. Describes in which part of the internal/external memory the Marvell device stores certain data, and the options of reading some portions of the memory with burst mode. Public knowledge could enable a competitor to derive the structure of the internal memory in Marvell's device. b. Describes a mechanism to address the challenge when a CPU has to access a much larger addressable memory inside a device than the PCI bus that connects the CPU to the device. This solution allows system designers to place multiple devices on the same PCI bus without allocating its entire memory to any individual device.		
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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	Government Exhibit 16: Application Note Controlling Traffic to the CPU for 98EX1xx-C/D and 98MXxx Presteria® Packet Processors Specific pages that contain purported trade secret information: a. pg. 10, Table 3: Handling Traffic to CPU by Frame Type; b. pg. 13, Table 4 Sample Queue Usage for Traffic-to-CPU Handling.	<u>Compendium of information</u> Describes Marvell's recommendation on how to control the traffic to the CPU in a complex system built around Marvell's device that receives multiple protocols. Public disclosure would reveal vulnerability of the system, enabling competitors to effectively bombard the system to make it fail or perform poorly. <u>Specific pages containing purported trade secret information</u> a. Detailed description of how Marvell classifies data packets according to different protocols. (Specific testimony explaining how the information derives economic value from not being generally known is lacking.) b. Marvell's recommended queue mapping. Although customers have freedom to implement their own queue mapping, for those customers who do follow Marvell's recommendation, this table can be used to design an attack that makes the customers' system perform poorly.	Watermark and footer state "confidential"	3/18/2005
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12. At the time Zhang's residence was searched on June 24, 2005 for files downloaded from the Marvell Extranet, Zhang was questioned about the downloads by the case agent for the FBI. He acknowledged that he had downloaded Marvell files and first said that he was researching certain projects for Netgear and that was the reason that he downloaded the files. After being confronted with the fact that over seventy files had been downloaded and some did not appear to be related to Zhang's work at Netgear, he said that he was studying the files out of engineering curiosity. Zhang adamantly denied that he shared any of the information he downloaded with Broadcom or loaded any of it onto his Broadcom laptop computer. However, a subsequent search of his Broadcom laptop computer revealed that he had, in fact, copied the Marvell files he downloaded from the Marvell Extranet onto his Broadcom laptop. A June 2, 2005 e-mail shows that he

1 forwarded a page from his March 9, 2005 download (Exhibit # 28) to his colleagues at Broadcom
2 that tended to confirm that Cisco had not given Broadcom a truthful explanation as to why it chose a
3 particular Marvell product over a competing one from Broadcom.

4 **III. APPLICATION OF LAW TO FACTS**

5 **A. Counts One Through Three (Computer Fraud and Abuse Act)**

6 Counts One through Three allege violations of the Computer Fraud and Abuse Act
7 (“CFAA”), 18 U.S.C. § 1030(a)(4), which imposes criminal liability on an individual who
8 “knowingly, and with intent to defraud, accesses a protected computer without authorization, or
9 *exceeds authorized access*, and by means of such conduct furthers the intended fraud and obtains
10 anything of value” (Emphasis added). The CFAA does not define the term authorization. The
11 term “exceeds authorized access” is, however, defined as “to access a computer with authorization
12 and to use such access to obtain or alter information in the computer that the accesser is not entitled
13 so to obtain or alter.” 18 U.S.C. § 1030(e)(6). The Ninth Circuit in a recent en banc decision held
14 that “‘exceeds authorized access’ in the CFAA is limited to violations of restrictions on *access* to
15 information, and not restrictions on its *use*.” *United States v. Nosal*, 2012 WL 1176119 *8 (9th Cir.
16 April 10, 2012) (emphasis in original); *see also LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th
17 Cir. 2009).

18 In *Nosal*, the defendant had worked for Korn/Ferry, an executive search firm. Shortly after he
19 left the company, he convinced some of his former colleagues who were still working for
20 Korn/Ferry to help him start a competing business. The employees used their log-in credentials to
21 download source lists, names and contact information from a confidential database on the company's
22 computer, and then transferred that information to the defendant. The employees were authorized to
23 access the database, but Korn/Ferry had a policy that forbade disclosing confidential information.
24 The defendant was charged under the CFAA with violations of 18 U.S.C. § 1030(a)(4), for aiding
25 and abetting the Korn/Ferry employees in “exceed[ing their] authorized access” with intent to
26 defraud. The court held that the defendant had not violated the CFAA because the employees who
27 acted on Nosal’s behalf had authorized access to the database—the fact that they exceeded their
28 authorized use did not give rise to a violation of the CFAA. *Nosal*, 2012 WL 1176119, at *7.

1 The parties were given leave to file supplemental briefing on the application of the holding in
2 *Nosal* to the instant case because the en banc decision came out while the instant case was under
3 submission. The government conceded in its supplemental brief that *Nosal* applies to the facts as
4 alleged in the Superseding Indictment and as presented at trial in this case. The court agrees. Under
5 the Ninth Circuit's definition of "exceeds authorized access," *id.*; *LVRC Holdings*, 581 F.3d at 1132-
6 36, Zhang had "authorized access" to the Marvell Extranet when he downloaded the information
7 from the Marvell Extranet in March 2005 because he had active log-in credentials at that time.

8 Therefore, Zhang is not liable for violating the CFAA. Specifically he is not guilty of Counts
9 One through Three.

10 **B. Counts Four through Six (Theft, Misappropriation and Unauthorized Downloading**
11 **of Trade Secrets)**

12 Zhang is charged in Counts Four through Six with misappropriating Marvell's trade
13 secrets by his downloads from the Marvell Extranet on March 9, March 16 and March 18,
14 respectively, in violation of 18 U.S.C. § 1832(a)(1), (2) and (4) which provide:

15 (a) Whoever, with intent to convert a trade secret, that is related to or included in a
16 product that is produced for or placed in interstate or foreign commerce, to the
economic benefit of anyone other than the owner thereof, and intending or knowing
that the offense will, injure any owner of that trade secret, knowingly—

17 (1) steals, or without authorization appropriates, takes, carries away, or
18 conceals, or by fraud, artifice, or deception obtains such information;

19 (2) without authorization copies, duplicates, sketches, draws, photographs,
20 downloads, uploads, alters, destroys, photocopies, replicates, transmits,
delivers, sends, mails, communicates, or conveys such information;

21 * * *

22 (4) [or] attempts to commit any offense described in paragraphs (1) through (3)
23 . . . shall . . . be fined under this title or imprisoned not more than 10
24 years, or both.

25 In *Nosal* the Ninth Circuit pointed out how Congress used broader language than that used in
26 the CFAA in describing the crimes set forth in 18 U.S.C. § 1832 "where it used the common law
27 terms for misappropriation, including 'with intent to convert,' 'steals,' 'appropriates' and 'takes'."
28 *Nosal*, 2012 WL 1176119, at *2 n. 3. Therefore, under § 1832, the elements the Government must
have proven to establish Zhang's guilt are: (1) that Zhang intended to convert information to the

1 economic benefit of someone other than Marvell; (2) that the information constituted a trade secret;
2 (3) that the trade secret was related to or included in a product that was produced for or placed in
3 interstate or foreign commerce; (4) that Zhang stole or misappropriated the trade secret from
4 Marvell; and (5) that he stole or misappropriated the trade secret intending or knowing that the
5 offense would injure Marvell.

6 **1. Zhang Intended to Convert the Information for His Own Benefit**

7 The defense argued that Zhang had access to all the information that he downloaded and that
8 the Government failed to prove that the downloads were not made by him in connection with his job
9 duties as Netgear. The court finds that the circumstantial evidence establishes beyond any
10 reasonable doubt that the subject downloads were not made by Zhang in the performance of his
11 duties for Netgear. That circumstantial evidence includes:

- 12 • the timing of the downloads (they were accomplished after Zhang had accepted his position
13 with Broadcom);
- 14 • the volume of Zhang's downloads after he had accepted the job offer from Broadcom but
15 still at Netgear was substantially larger than the total downloads of all other Netgear employees;
- 16 • Zhang said that he had removed himself from any new Netgear projects before the
17 downloads occurred;
- 18 • the downloads included information about products that Netgear had never purchased from
19 Marvell;
- 20 • no evidence suggested that Zhang needed any of the information "to drive existing
21 committed projects for delivery" (Ex. 31);
- 22 • the downloaded material was transferred to Zhang's Broadcom laptop computer; and
- 23 • Zhang's responses to questions from the FBI agent at the time of the search of his premises
24 strongly suggest that he was trying to hide the fact that he had downloaded the documents.

25 The court concludes beyond a reasonable doubt that Zhang intended to convert the
26 downloaded material for his own personal benefit and not for the benefit of Netgear.

27 **2. The Information Constituted Trade Secrets**

1 [T]he term “trade secret” means all forms and types of financial, business,
2 scientific, technical, economic, or engineering information, including patterns, plans,
3 compilations, program devices, formulas, designs, prototypes, methods, techniques,
4 processes, procedures, programs, or codes, whether tangible or intangible, and
whether or how stored, compiled, or memorialized physically, electronically,
graphically, photographically, or in writing if

5 (A) the owner thereof has taken reasonable measures to keep such information
6 secret; and

7 (B) the information derives independent economic value, actual or potential,
8 from not being general known to, and not being readily ascertainable through proper
9 means by the public. . . .

10 18 U.S.C. § 1839; *United States v. Chen*, 659 F.3d 815, 827 (9th Cir. 2011).

11 As described in detail in the table above, the material downloaded by Zhang from the
12 Marvell Extranet consisted of technical and engineering information, including compilations
13 showing Netgear’s design choices and implementations. It clearly falls within the type of subject
14 matter that can be protected as a trade secret. *See* 18 U.S.C. § 1839 (“engineering information
15 including . . . compilations, . . . designs”). However, to be considered a trade secret, the Government
16 must have proven: (1) that Marvell took reasonable measures to keep such information secret; and
17 (2) that the information Zhang downloaded derived independent economic value or potential
18 economic value from not being generally known to, and not being readily ascertainable through
19 proper means by the public. The Government relied on Exhibits 1 through 8 as showing trade
20 secrets downloaded on March 9, 2005, Exhibits 9 through 13 as showing trade secrets downloaded
21 on March 16, 2005 and Exhibits 14 through 16 as showing trade secrets downloaded on March 18,
22 2005. The evidence is first examined to determine whether the two requirements necessary for
23 material to be considered trade secret are met.

24 **a. Reasonable Measures to Keep Information Secret**

25 The trade secret nature of information can be lost if reasonable measures are not taken to
26 protect secrecy. In light of the nature of Marvell’s business, Marvell could not restrict access to only
27 a select group of its own employees. Existing and potential customers needed to review information
28 concerning Marvell’s products, including sensitive proprietary, confidential information, in order to
consider the suitability of the Marvell chip sets for incorporation into their (the customer’s or
potential customer’s) devices. The defense showed that some Marvell information that was marked

1 as “confidential” was freely available on the Internet from other than Marvell’s website and that
2 Broadcom had in its possession some “confidential” Marvell documents which were obtained from
3 unidentified sources other than Zhang. None of the documents at issue, however, were found on the
4 Internet or at Broadcom. Although Marvell’s measures were not perfect and some unauthorized use
5 of information obtained from Marvell was inevitable, Marvell’s measures to maintain secrecy were
6 reasonable, particularly given that Marvell’s business required that trade secret information be
7 shared with customers and potential customers. Marvell had an elaborate system that limited access
8 to its Extranet to those with a need to know. *See* § 5(b)-(e) *above*. The system also allowed Marvell
9 to trace who accessed the Extranet. *Id.* Documents that were downloaded were clearly marked as
10 confidential. *See* § 5(e) *above*.

11 The defense did not challenge the security measures that restrict access to Marvell’s business
12 campus. It focused on what it contended is the inadequate protection of information available on the
13 Marvell Extranet. Namoni Fine, an attorney whose practice involves advising clients on establishing
14 procedures to protect trade secrets, was defendant’s primary witness on the alleged inadequacy of
15 Marvell’s measures to maintain secrecy of its purported trade secrets. She was critical of Marvell
16 for not being more discriminating in its labeling of its documents, i.e. marking as confidential or
17 trade secret only those documents that clearly qualify as such. Ms. Fine contended that such overly
18 liberal marking of information results in a lack of respect for confidential designations and a lack of
19 understanding as to what documents truly contain trade secrets. Marvell did not distinguish
20 documents containing trade secret information from those that Marvell wanted kept confidential
21 even if they did not contain trade secret information. Although Ms. Fine did not identify particular
22 documents or a class of documents that she believed were marked as confidential but, in fact, were
23 not trade secrets, the evidence does suggest that Marvell marked everything available through the
24 Marvell Extranet as “confidential.” Although Marvell could have been more discriminating in its
25 marking of documents, the evidence does not show that Netgear or any other customer was misled
26 by, or failed to treat as secret, any Marvell document designated as confidential. In other words,
27 Marvell’s designation of some documents as confidential when they did not contain trade secrets,
28

1 does not mean that Marvell lost trade secret status on those documents that actually contained trade
2 secret information.

3 The court concludes that the Government proved that Marvell took reasonable measures to
4 protect its trade secret information. Marvell was a company the industry recognized as being
5 protective of its proprietary and confidential information. In light of Marvell's need to share
6 information with actual and prospective customers, it went to elaborate lengths to restrict access to
7 its Extranet and trace downloads from it. This, of course, does not mean that the marking of any
8 document as proprietary and confidential makes it so. The document must still be proven to have
9 trade secret status. In this case, we look primarily to Hervey's testimony and whether it established
10 beyond a reasonable doubt the trade secret status of information in each of the sixteen documents.
11 *See Table in § 11 above.*

12 Ms. Fine also advocated use of encryption techniques. She did not explain, however, how an
13 encryption system could be utilized in Marvell's business nor the extent of any risk that could be
14 eliminated by the use of encryption.

15 Ms. Fine also suggested that Marvell's security was deficient because Marvell did not
16 maintain a practice of immediately revoking the Extranet password of any person whose
17 employment with a company having access was terminated. Passwords had to be renewed every
18 120 days but Marvell did not have a practice of terminating access immediately on the departure of
19 an accessing company's employee. However, since any log-in showed the date, time, name of the
20 person logging on and nature of the download, a departing employee would know that any download
21 he or she made in the limited time before his or her password expired could be traced. Under these
22 circumstances, the risk of a breach of security by one whose password was about to expire was
23 remote.

24 **b. Potential Independent Economic Value From Not Being Generally**
25 **Known**

26 A majority of the documents introduced by the Government as Exhibits 1 through 16 were
27 shown to each have independent value as compilations of information which showed Marvell's
28 design choices and how Marvell implemented its designs and product features. *See Table in § 11*

1 *above*. Although much of the information in the downloaded documents is publicly available, the
2 testimony of Hervey explained the benefit a competitor would gain from having the compilations.
3 Hervey also identified several pages from the exhibits which contain information of actual or
4 potential economic value from not being generally known. *See id.*

5 The court identified in § 11 *above* the material downloaded from each of the three charged
6 downloads which was shown to have independent economic value from not being generally known
7 to the public and not being readily ascertainable through proper means.

8 **3. The Trade Secret Information Was Related to Various Products Placed in** 9 **Interstate Commerce**

10 There is no dispute that the trade secret information that Marvell sought to protect was
11 information related to various products Marvell placed in interstate commerce, such as the Link
12 Street line of products and the Pretera line, including the DX, EX and MX.

13 **4. Zhang Stole the Trade Secret Information from Marvell**

14 There is no dispute that Zhang downloaded the information which is the subject the
15 indictment and, as discussed, the evidence showed that most of it was misappropriated.

16 **5. Zhang Intended or Knew His Offense Would Injure Marvell**

17 The only reasonable inference to draw from the evidence is that Zhang knew that his
18 acquisition of the trade secret information would potentially injure Marvell. He, at a minimum,
19 wanted to obtain the Marvell information so that he could become more knowledgeable and thus
20 gain a competitive advantage over Marvell for himself, Broadcom or for whomever he was working
21 at the time he saw fit to utilize what he had downloaded.

22 The Government has proved beyond a reasonable doubt that each element of the offense of
23 theft of trade secrets under 18 U.S.C. § 1832 and, therefore, Zhang is guilty of Counts Four (theft of
24 compendiums of information of Exhibits 1 through 8 and information on individual pages thereof
25 identified as trade secrets in the Table in § 11 *above*), Count Five (theft of compendiums of
26 information of Exhibits 9 through 13 and information on individual pages thereof identified as trade
27 secrets in the Table in § 11 *above*) and Count Six ((theft of compendiums of information of Exhibits
28

1 13 through 16 and information on individual pages thereof identified as trade secrets in the Table in
2 § 11 *above*).

3 **C. Count Seven (Copying and Transmission of Trade Secrets)**

4 Count Seven deals with Zhang's transmission on April 27, 2005 of the trade secrets he
5 downloaded from the Marvell Extranet to his Broadcom laptop computer. 18 U.S.C. § 1832(a)(2)
6 proscribes the unauthorized copying, duplicating or transmitting of trade secret information. The
7 elements of this offense are discussed above. It is clear from the evidence that although Zhang
8 denied doing so, a search of his Broadcom laptop computer revealed that on April 27, 2005, he
9 copied the information he downloaded from the Marvell Extranet to his Broadcom laptop computer.

10 Zhang is guilty of Count Seven.

11 **D. Count Eight (Unauthorized Transmission of Trade Secrets)**

12 Count Eight charges that on June 2, 2005 Zhang transmitted Exhibit 28 (Tri-Speed Ports
13 Table) to Kelley Coffee, a director of field application engineers at Broadcom, in violation of 18
14 U.S.C. §1832(a)(2). Zhang made the transmission in response to a concern Coffee had as to the
15 truth of a purported explanation given by Cisco as to why it chose a Marvell device over a
16 competing Broadcom device. The purported explanation was that the Broadcom device required
17 "extra componentry" to interface with the Cisco device while the higher voltage Marvell device did
18 not. Coffee did not think the explanation made sense and Zhang confirmed Coffee's belief that the
19 explanation made no sense by sending him Exhibit 28, an excerpt from the Marvell DX 2X data
20 sheet which showed that the Marvell device operated at the low voltage of a standard interface. This
21 information was not secret. Coffee did not use the information to obtain any benefit for Broadcom
22 except that he apparently blamed an employee in the Broadcom sales force for not having correct
23 information about Marvell's standard interface operating voltage.

24 Although the electrical current information in Exhibit 28 constitutes trade secret information
25 as discussed in § 11 *above*, Zhang did not transmit Exhibit 28 to Coffee for the purpose of disclosing
26 the electrical current information. Since he sent only the one page from Exhibit 5, it appears that he
27 intended only to answer Coffee's inquiry.

1 It is certainly possible, or even probable, however, that Zhang knew that Exhibit 28
2 contained electrical current data that was secret, proprietary information. However, it does not
3 appear that he focused on that when he transmitted the document to Coffee. If he had wanted to
4 reveal information about the hardware design of the DX 2X he presumably would have sent more
5 information. There is no evidence that Broadcom was considering any redesign of its device or that
6 the information on Exhibit 28 would have been of benefit if it did so. Coffee testified that the
7 information provided no competitive advantage to Broadcom.


8 The court cannot find beyond a reasonable doubt that Zhang intended to, or knew, that the
9 transmission would harm Marvell. Therefore, Zhang is not guilty of Count Eight.

10 **E. Count Nine (Unauthorized Transmission of Trade Secrets)**

11 Count Nine charges that on June 24, 2005 Zhang possessed the trade secrets he downloaded
12 from the Marvell Extranet and transferred to his Broadcom laptop computer. His possession
13 constitutes a violation of 18 U.S.C. § 1832(a)(2).

14 Zhang is guilty of Count Nine.

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16 DATED: May 29, 2012

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18 RONALD M. WHYTE
19 United States District Judge
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